ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Rule Making Requesting Amendment of the Commission's Rules Relating to the Operation of Radio and Television Stations under Time Brokerage Agreements	)	RM No. RM-10012

To: The Commission

COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation ("Paxson"), by its attorneys, respectfully submits herewith its Comments on the Petition for Rule Making (the "Petition") filed by David Tillotson, Esq. ("Petitioner") requesting amendment of the Commission's Rules relating to the operation of radio and television stations under time brokerage agreements. Petitioner requests that the FCC commence a rule making to consider adopting a "one size fits all" list of "do's and don'ts" for purposes of evaluating whether a radio or television station's operations under a time brokerage agreement would result in an unauthorized transfer of control of the station's license from the licensee to the broker of the station.

Paxson, the owner of the largest broadcast television group in the United States and the creator of the seventh and newest over-the-air broadcast network, PAXTV, has substantial experience with time brokerage agreements. Through time brokerage agreements, Paxson has assisted many new and struggling broadcasters to construct, operate and program their stations, while remaining in ultimate control of their station's license and key operations. Such agreements also have served the public interest because they have allowed Paxson to realize substantial efficiencies and cost savings and in turn provide enhanced service to the public.

Paxson urges the Commission to deny the Petition because current Commission rules and precedent provide broadcasters with sufficient notice of the FCC's standards and policies regarding unauthorized transfers of control. In addition, any checklist adopted by the Commission will only result in further uncertainty regarding time brokerage arrangements. Any checklist also would unnecessarily restrain broadcasters in structuring time brokerage agreements that comply with the Commission's rules but also meet broadcasters' business needs.

I. Background and Commission Review of Time Brokerage Agreements.

Time brokerage agreements, also called local marketing agreements or "LMAs", generally involve the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the local commercial spot announcements to support the programming.[1] Time brokerage agreements come in many different shapes and sizes. Some provide that the broker will provide only programming and sales services to the licensee, and with respect to programming, the amount of programming supplied by the broker may range from 5% to 100% of a station's weekly programming hours. Other arrangements provide that in addition to programming or sales, the broker may provide technical or engineering services, or may lease studio or transmitter facilities to the licensee. In almost all cases, the arrangement allows the licensee to reduce programming costs, staff and certain other operating expenses, while still retaining ownership of and some profit from the station's operations. Brokers benefit from time brokerage agreements because they often will consolidate their own station's programming and sales functions with those of the licensee's station, thereby achieving significant economic and operational efficiencies. Under current FCC rules, the Commission

[1] *See Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report and Order, MM Docket Nos. 94-150, 92-51, 87-154, 14 FCC Rcd 12559, 12591(1999), *recon. pending.*

attributes ownership of a television or radio station where the brokering station provides more than 15% of the weekly programming to another station in the same market. Such agreements therefore are subject to the FCC's restrictions on the ownership of television and radio stations in local markets.[2]

The Commission's regulation of time brokerage agreements is based primarily on the concern that any such arrangements comply with Section 310(d) of the Communications Act of 1934, as amended (the "Act").[3] Section 310(d) provides that control of a station's license may only be transferred or assigned to another person "upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."[4] With respect to time brokerage agreements, then, the FCC's rules and policies require that such arrangements be structured to ensure the licensee of the brokered station remains in control of the station's license and operations, notwithstanding the involvement of the broker in the station's day-to-day programming, marketing and operations.

In analyzing whether a particular time brokerage agreement complies with Section 310(d) and its rules, the Commission looks "beyond the legal title to whether a new entity or individual has obtained the right to determine the basic operating policies of the station," such as the right to affect decisions concerning the personnel, programming, or finances of the station.[5] Rather than employ specific "control" standards, the Commission reviews time brokerage agreements

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[2] 47 C.F.R. §§ 73.3555(a)-(d) & Note 2(k) (2000).

[3] 47 U.S.C. § 310(d) (2000); *see Revision of Radio Rules and Policies*, Report and Order, MM Docket No. 91-140, 7 FCC Rcd 2755, 2784, 2787 (1992) (*"Radio Report and Order"*).

[4] 47 U.S.C. § 310(d).

[5] *Bear Valley Broadcasting, Inc.*, 2000 FCC Lexis 5592, at *5 (Oct. 20, 2000); *See e.g. Delta Radio, Inc.*, 13 FCC Rcd 21708, 21710 (1998); *Siete Grande Television, Inc.*, 11 FCC Rcd 21154, 21156 (1996); *WHDH Inc.*, 17 FCC 2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

on a case-by-case basis, taking into account all of the facts presented by the circumstances, including the formal provisions of the time brokerage agreement and the parties' conduct thereunder.

It is the lack of a specific formula in the Commission's review of unauthorized transfer and time brokerage cases of which Petitioner complains. Specifically, Petitioner alleges that there are no objective standards for determining whether a time brokerage arrangement has resulted in an unauthorized transfer of control, and that, in the absence of such standards, any decision by the Commission regarding such transfers is arbitrary, capricious and inherently subjective.

Petitioner fails to demonstrate that, in the absence of a list of "do's and don'ts," any decision by the Commission on an unauthorized transfer involving a time brokerage agreement necessarily would be arbitrary and capricious. To the contrary, the Commission's case-by-case analysis of specific facts and circumstances under its general "control" standard provides broadcasters with more than sufficient notice of the Commission's time brokerage requirements. Given the intense factual nature of transfer of control cases, it would be practically impossible for the Commission to apply a specific set of control standards on any consistent basis that would ensure parties have any better notice of the FCC's requirements than they do now. Moreover, any list of time brokerage "do's and don'ts" is unlikely to provide the certainty that Petitioner so desperately craves because it will result in the creation of loopholes and varying interpretations of the standards that ultimately will still need to be evaluated on a case-by-case basis.

II. Commission Rules and Precedent Provide Sufficient Guidance for Broadcasters in Structuring Time Brokerage Agreements.

To provide sufficient notice of its requirements, a regulation need not provide mathematical certainty or a high level of specificity.[6] Indeed, regulations may embody flexibility and reasonable breadth and still meet the requirements of constitutional due process.[7] Courts thus have found that "regulations will be found to satisfy due process so long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require."[8]

Clearly, the extensive body of regulation and case precedent that the Commission has developed over the past 20 years provides broadcasters with sufficient notice of what types of practices or combinations of practices could result in a finding that a time brokerage agreement has resulted in an unauthorized transfer of control. In its rulemakings, the Commission has provided examples of practices and conduct that could result in an unauthorized transfer of control. In its cases, the Commission has consistently applied its general control standard – whether control of the station's basic operating financial, personnel and programming policies has been transferred to a third party without prior Commission consent – to specific factual circumstances, ruling on the permissibility of various time brokerage agreement provisions and practices. Thus, a reasonably prudent person, familiar with the FCC's rules and precedent on time brokerage agreements, has "fair warning" of the FCC's requirements.

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[6] *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

[7] *Id.*

[8] *Walker Stone Co., Inc. v. Secretary of Labor*, 156 F.3d 1076, 1083-84 (10th. Cir. 1998) ("*Walker Stone*") (quoting *Freeman United Coal Mining Co. v. Federal Mine Safety and Health Review Comm'n*, 108 F. 3d 358, 361 (D.C. Cir. 1997) ("*Freeman*")).

III. Applying a Fixed Set of Standards Is Not Appropriate for Evaluating Unauthorized Transfers of Control.

Petitioner is essentially proposing that the Commission develop a "one size fits all" standard for evaluating time brokerage agreements. What Petitioner fails to acknowledge is that facts and circumstances regarding control of a station license under a time brokerage agreement or any other vehicle do not fit a "one size fits all" framework. This much is evident in the facts underlying the *King Broadcasters*[9] case as well as numerous other cases involving time brokerage agreements. In *King*, the Commission's investigation of the parties' Programming Services Agreement and other relationships alone spanned over a year. The Commission made numerous written inquiries to the parties involving a significant number of transactions including equipment purchases and financing, programming changes and personnel actions. There were multiple agreements and arrangements among King Broadcasters, Inc., the licensee of stations KSLD(AM) and KKIS-FM, Chester Coleman, the first broker of the stations, and John Davis, the second broker of the stations. Significantly, despite the parties' assertion that the Programming Services Agreement complied with FCC rules on time brokerage agreements, the parties themselves did not comply with the terms of the Programming Services Agreement. In short, even if the FCC had a checklist of "do's and don'ts" it would not have been comprehensive enough to address all of the factual circumstances that were present in this case.

Parties to a time brokerage agreement design it to fit their particular needs. As discussed above, in some instances, not all of a licensee's programming will be provided by the broker. In some instances, the parties may share studio facilities; in other cases, offices and studios will remain separate. In still other cases, the licensee may lease its transmitter facilities from a broker. Not all of the economic arrangements and procedures will be the same. How the parties

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[9] *King Broadcasters, Inc.*, 13 FCC Rcd 25317 (1998).

function in practice also will vary widely from case to case. Thus, given the significant variation among time brokerage agreements and the parties' conduct, a checklist of "do's and don'ts" could not anticipate each event or combination of events that would result in an unauthorized transfer of control. In the end, the Commission still would be required to conduct a factual analysis of individual cases.

Adoption of specific objective standards also is likely to result in increased uncertainty in the structuring of time brokerage arrangements because parties will seek to create loopholes and exceptions to the specific requirements. As the courts have recognized, when regulations become too specific, loopholes and exceptions may be opened, which allows certain conduct to remain unregulated notwithstanding that the regulations were intended to govern such conduct.[10] The end result is that the validity of the specific standards is undermined and regulated entities are left with uncertainty regarding what the standards mean. Applied in the instant context, the Commission would be required to interpret its supposedly "fixed" standards, applying them to specific facts and circumstances to determine whether loopholes or exceptions are properly permitted. Again, the Commission would have no choice but to engage in a detailed factual analysis that may create further uncertainty for parties in structuring their agreements and clearly would undercut the legitimacy of fixed standards.

IV. A Set of Fixed Standards Would Unnecessarily Deny Broadcasters the Flexibility to Structure Time Brokerage Agreements.

The Commission has long recognized the public interest benefits of time brokerage agreements. In its 1992 decision to attribute radio station time brokerage agreements, the Commission stated that such agreements "provide separately owned stations with efficiencies similar to those available to commonly owned stations by permitting them to function

cooperatively via joint advertising sales, shared technical facilities and joint programming arrangements."[11] The Commission further noted that precluding stations from entering into such arrangements could unduly restrict stations' flexibility to adapt to changing market conditions.[12] Congress similarly recognized the value of LMAs in the television industry when it directed the Commission to grandfather television LMAs in The Telecommunications Act of 1996.[13]

Establishing a checklist of "do's and don'ts" will prevent broadcasters from structuring their time brokerage agreements to meet their particular needs and market conditions. Those needs and conditions will vary from case to case so a "one size fits all" set of standards would fail to provide broadcasters the flexibility to design their time brokerage relationships in accordance with both business considerations and FCC rules. Moreover, at a time when broadcasters face ever-increasing competition from a multitude of media, including DBS, cable and the internet, it is clearly inappropriate for the Commission to consider new ways to restrict broadcasters' business practices absent some supportable legal justification. Petitioner has not provided the Commission with any such legal justification.

V. If the Commission Opens a Rule Making Proceeding, It Should Limit Its Consideration to Time Brokerage Agreements Involving Substantial Amounts of Programming.

Should the Commission decide to initiate a rulemaking to consider Petitioner's proposals, it should restrict its consideration to a very limited class of time brokerage agreements, i.e., those agreements pursuant to which the broker is providing the licensee with 50% or more of its

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[10] *See Walker Stone*, 156 F. 3d at 1083; *Freeman*, 108 F. 3d at 362.

[11] *Radio Report and Order*, 7 FCC Rcd at 2784.

[12] *In Re Revision of Radio Rules and Policies*, Second Memorandum Opinion and Order, MM Docket No. 91-140, 9 FCC Rcd 7183, 7192 (1994).

[13] S. Conf. Rep. 104-230, 1996 WL 54191 (Feb. 1, 1996).

weekly programming. In these situations, the broker is providing a substantial amount of programming and there is a greater potential for the broker to exercise influence over the control of the brokered station. A set of standards could be useful in outlining for such parties the practices that could lead to an unauthorized transfer of control.

Time brokerage agreements whereby the broker is providing less than 50% of the brokered station's weekly programming do not present as high a level of involvement by the broker in station operations and accordingly poses a smaller risk of an unauthorized transfer. Similarly, joint sales agreements, arrangements that do not involve any programming of the brokered station, do not pose such a significant risk of unauthorized transfer that a fixed set of control standards should apply. The public interest would be far better served by allowing parties to these agreements maximum flexibility in structuring their business relationships while still remaining in compliance with Commission rules.

VI. Conclusion.

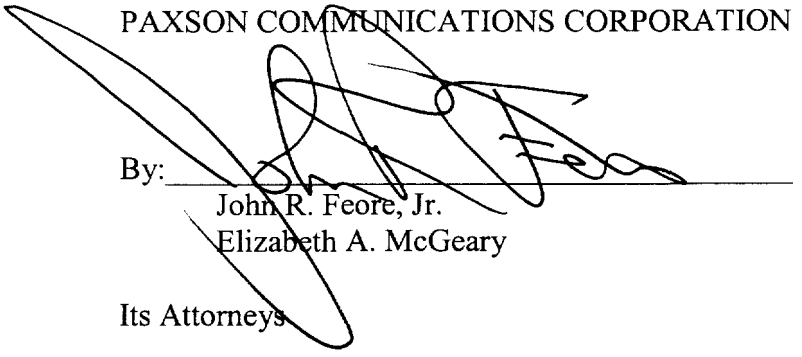
Petitioner's case for establishing a fixed set of "control" standards for evaluating time brokerage agreements does not warrant the commencement of a rule making proceeding. Petitioner has not shown that the Commission's current standards and policies for review of such agreements are inadequate or fail to provide regulated parties with notice of regulatory requirements. Petitioner also fails to recognize that creating a "do's and don'ts" checklist for time brokerage agreements will not be an effective means for the Commission to adjudicate alleged transfers resulting from a time brokerage agreement. Indeed, a checklist will never be comprehensive enough to encompass all possible arrangements and agreements between a broker and licensee. Moreover, too much specificity will allow parties to create loopholes and exceptions to the fixed standards such that the Commission will still be required to evaluate the specific facts and circumstances of each case.

The Commission has steadfastly refused to adopt specific standards for evaluating the legality of time brokerage agreements and unauthorized transfers of control, recognizing that issues of control are inherently fact-specific and that a more general standard must be applied to the specific agreements and factual circumstances involved in each case. The Commission's approach has not resulted in arbitrary and capricious decision making but rather detailed case-by-case analysis of often complicated business transactions that provides parties with notice of those time brokerage practices that may result in an unauthorized transfer of control.

In sum, the current system is not broken, and therefore there is simply no need to fix it. Accordingly, Paxson respectfully urges the Commission to decline Petitioner's proposal to commence a rule making to consider specific standards for time brokerage agreements.

Respectfully submitted,

PAXSON COMMUNICATIONS CORPORATION



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December 26, 2000

CERTIFICATE OF SERVICE

I, Sherene F. McDougall, do hereby certify that a true and correct copy of the foregoing **COMMENTS OF PAXSON COMMUNICATIONS CORPORATION** was delivered by First Class U.S. Mail, postage prepaid, on this 26th day of December, 2000, to the following:

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Sherene F. McDougall